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No. [illegible]

In the Supreme Court of the United States

[illegible]

[illegible]

v.

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 261

SOUTHERN FARMS, INC., PETITIONER

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18–22) was reported at 301 F. 2d 130. The opinion of the district court (Pet. App. 15–17) is reported unofficially at 44 Lab. Cases ¶ 31,235.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1962 (Pet. App. 23), and appellee's petition for rehearing was denied on April 27, 1962 (Pet. App. 24). The petition for a writ of certiorari was filed on July 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner's major supplier of eggs was not a "farm assembler or other establishment through which the commodity customarily moves" within the meaning of the Secretary's regulations and therefore petitioner was not within the area of production entitling it to an exemption from the Fair Labor Standards Act.

2. Whether the court of appeals, having rejected the district court's determination that petitioner was exempt from the Act, erred in reversing and remanding the cause to the district court to determine whether an injunction should issue prohibiting petitioner from violating the Act, where the district court had stated that it would refuse an injunction on discretionary grounds.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), and the regulations issued under the Act, 29 C.F.R. 536.2, are set forth at pages 3 through 5 of the petition.

STATEMENT

The Secretary of Labor brought this action to restrain petitioner from continuing to violate the Fair Labor Standards Act. Petitioner is engaged in buying, candling, and selling eggs in Itta Bena, Mississippi (Pet. App. 18). It contends that, although it is engaged in interstate commerce, it is exempt from the wage provisions of the Act under Section 13(a)(10),

which provides a special exemption as to "individual[s] employed within the area of production (as defined by the Secretary)" in the handling of agricultural commodities (Pet. 4).[1] Under the Secretary's definition, an employee in an egg-handling establishment is employed within the "area of production" if 95 per cent of the eggs handled by the establishment come from normal sources of supply located within fifty air miles of the establishment (29 C.F.R. 536.2; Pet. 4–5). These sources may be "farms" or "farm assemblers or other establishments through which the commodity customarily moves" (*ibid.*).

At least 20 per cent of petitioner's eggs came from farms more than fifty air miles from petitioner's establishment, and were delivered there by the Greenwood Egg Company (Pet. App. 21). Petitioner contends that it qualifies for exemption under Section 13(a)(10), because Greenwood is a "farm assembler or other establishment" within the meaning of the Secretary's regulation and is located within fifty air miles of petitioner's establishment (Pet. 11).

Greenwood is a partnership owned by the vice-president and the secretary of petitioner (Pet. App. 21). It has no plant, office, or other establishment of its own, and no facilities for assembling eggs other than petitioner's establishment at Itta Bena (*ibid.*). Its trucks deliver the eggs direct from the farms to petitioner's establishment (*ibid.*).

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[1] The term "Secretary" was substituted for "Administrator" by Reorganization Plan No. 6 of 1950, 15 Fed. Reg. 3174, 64 Stat. 1263, 5 U.S.C. 133z–15.

The district court denied the injunction on the ground that petitioner was exempt from the Act under Section 13(a)(10). It added that, in any event, it would have denied the injunction because future violation of the Act was unlikely (Pet. App. 16).

The court of appeals reversed on the ground that Greenwood was not a "farm assembler" or "other establishment" within the meaning of the Secretary's regulation and that, accordingly, its deliveries of more than 5 per cent of petitioner's eggs from out-of-area farms disqualified petitioner from exemption under Section 13(a)(10). The court held, however, that the findings of fact as to the likelihood of future violation were "not clearly erroneous"; and it therefore remanded the cause with the instruction that "the district court, in its discretion, may decline to issue an injunction" (Pet. App. 21–22).

ARGUMENT

1. It is well settled that the burden is upon the employer claiming a special exemption under the Fair Labor Standards Act to show that he is "plainly and unmistakably within [the] terms and spirit" of the exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493. Petitioner completely failed to establish that it is entitled to the exemption. The court of appeals' interpretation of the phrase, "farm assemblers or other establishments through which the commodity customarily moves," not only accords with

the language of the regulation, but is required by the manifest intent of both the regulation and the statutory provision under which it was promulgated.

The purpose of the regulation and statute was to distinguish between processing establishments which obtain their supply from nearby agricultural sources, and those which draw on a more general market—only the former being deemed close enough to agriculture to share its special status of exemption from the Act. See *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 613–614; *Mitchell* v. *Budd*, 350 U.S. 473, 477–480. In promulgating his 1946 definition of "area of production" the Wage and Hour Administrator expressly stated that he was acting on the basis of that Congressional purpose. Findings of the Administrator, Dec. 18, 1946, CCH Lab. Law Rep. ¶ 23,282, p. 36,516. He noted that the task of determining the appropriate distances from the processing establishments to the producing farms was complicated by the fact that "some of the operations specified in the statute are two or more stages removed from the farm," and that at each successive stage "it is increasingly difficult to identify the farms on which the commodities had their origin" (*id.* at p. 36,518). For that reason, the Administrator explained, "[t]he 'distance' test was * * * drafted in terms * * * to include certain other establishments as well as farms" in determining what commodities came from within the area of production (*ibid.*).

This rationale for the inclusion in the regulation of "farm assemblers or other establishments through

which the commodity customarily moves" clearly does not apply to a supplier who picks up goods from distant farms and transports them by truck to the processor's plant, without pause for intermediate assembly, storage, or exhibition to customers at some establishment other than the processor's plant itself. It certainly does not apply where such a supplier is, like the supplier here, a partnership consisting of officers of the corporate processor and makes use of no facilities or offices other than the processor's. In these circumstances, there is no difficulty in determining exactly where the processor's supply comes from, and therefore no justification for disregarding the actual distance of the agricultural source. On the other hand, if, as petitioner contends, the regulation covers the situation involved here, the distance test provided by the regulation would be lax to the point of absurdity. Every processor could exempt himself from the wage provisions of the Act, however distant his farm sources, by simply arranging to get his farm products through an intermediary who owns a truck. There is nothing in the language of the administrative definition to require such a self-defeating result.

2. Petitioner contends that the court of appeals erred in remanding the case to the district court for a determination whether an injunction should be issued against violation of the Act. It reasons that the district court has already stated that, even if petitioner was not entitled to an exemption, the court would not issue an injunction since future violations are unlikely.

In remanding the case to the district court, the court of appeals did not grant the Secretary's request for an order directing the issuance of an injunction; it expressly instructed that "the district court, in its discretion, may decline to issue an injunction." Thus, on remand, if the district court should continue in its view that an injunction is not warranted, then petitioner will not have been injured by the remand. If, on the other hand, in the light of the appellate court's determination that petitioner is not exempt from the Act, the district court should determine that injunctive relief is appropriate, no injustice will have resulted.

There is no basis for petitioner's claim that the district court can cut off the court of appeals' power to remand the case for reconsideration, or its own power to exercise its judicial discretion in the light afforded by appellate exposition of the law. Congress has specifically provided in 28 U.S.C. 2106 that an appellate court could remand any cause for "such further proceedings to be had as may be just under the circumstances."[2] Here, the court of appeals properly decided that a remand was just and appropriate to allow the district court to determine whether it should

[2] 28 U.S.C. 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

issue an injunction after considering the court of appeals' determination that petitioner was not exempt from the Act.[3]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor,
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AUGUST 1962.

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[3] In *Baker* v. *Nason*, 236 F. 2d 483, 494 (C.A. 5), the court of appeals reversed and remanded for reconsideration even though "the Court below [had] stated that the case would be decided [the same way] independent of the finding of mutual fraud upon which the judgment rested."